86-466

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KING CORCORAN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to have his probation revocation hearing heard before the original sentencing judge?

2. Whether the Due Process Clause of the Fourteenth Amendment was violated when Petitioner's probation was revoked for failure to pay restitution despite Petitioner's demonstration of his inability to pay?

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OPINIONS BELOW

The unreported findings of fact and judgment of the Circuit Court for Baltimore City are reprinted in the Appendix ("App.") at App. 1-39. The opinion and judgment of the Court of Special Appeals of Maryland is reported as Corcoran v. State, 507 A.2d 200 (Md. 1986), and appears in the Appendix at App. (40-48). The Order of the Court of Appeals of Maryland denying the Petitioner's Petition for Writ of Certiorari is reported as Corcoran v. State, _____ A.2d _____, 307 Md. 83 (1986), and appears in the Appendix at App. 49-50.

JURISDICTION OF THE COURT

The Court of Special Appeals of Maryland issued its opinion on April 9, 1986 (App. 40). On July 24, 1986, the

Court of Appeals of Maryland denied the Petitioner's Petition for Writ of Certiorari (App. 49). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1257(3), Petitioner asserting the deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

As permitted by Rule 21(f), the relevant materials are cited here with their text set forth in the Appendix:

Fourteenth Amendment, United States Constitution

28 United States Code, Section 1257(3)

Article 27, Section 641, Maryland Annotated Code

Article 56, Section 255(a), Maryland Annotated Code

Article 56, Section 261(a)(1), Maryland Annotated Code

Article 56, Section 268, Maryland Annotated Code

Maryland Rule Procedure 4-346

STATEMENT OF THE CASE

Petitioner was charged in the Maryland District Court for Baltimore City with violations of the Maryland Home Improvement Laws. Specifically, Petitioner was charged with undertaking to perform a home improvement contract at a single-family home without first obtaining a home improvement license in violation of Section 255(a), Article 56, Md. Ann. Code. Petitioner was also charged with abandoning this home improvement contract in violation of Section 261(a)(1), Article 56, Md. Ann. Code.

As a result of Petitioner's jury trial prayer, Petitioner was tried

in the Circuit Court for Baltimore City[1] before the Honorable Carl Bacharach who, as trier of fact, found Petitioner guilty of both charges, but struck the conviction and imposed probation before judgement pursuant to Article 27, Section 641, Md. Ann. Code. In addition, Petitioner was ordered to pay restitution in the amount of $2,000.00 to the owners of the subject property within sixty days of the judgment.

Petitioner failed to pay the required restitution within the sixty-day period. When Petitioner failed to pay the restitution by an extended date granted by Judge Bacharach, a Notice of Violation of

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1. The Maryland District Courts do not have jursidiction to hear criminal cases in which the Defendant exercises his right to trial by jury.

Probation was filed which was signed by the Honorable Robert I. H. Hammerman, Chief Judge, Circuit Court for Baltimore City.

The violation of probation hearing proceeded before Chief Judge Hammerman on August 9, 1985 pursuant to an agreed statement of facts.[2/] Petitioner offered no evidence to rebut the allegation that he had failed to pay the restitution; instead, Petitioner testified in mitigation as to his inability to pay (App. 14-15, 20-21), and his later attempt to satisfy the restitution requirement by submitting a check through his former counsel's office which was never forwarded to the

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2. The record is silent as to why the violation of probation hearing proceeded before Chief Judge Hammerman and not the original sentencing court; i.e., Judge Bacharach.

victims (App. 10-11). Despite Petitioner's assertions, as well as his statement that he was prepared to pay immediately the money to the owner of the property, who was present in the courtroom, Judge Hammerman found Petitioner guilty of violating his probation and imposed a sentence of six months incarceration (App. 19; 37).

On August 9, 1985, Petitioner noted a timely appeal to the Court of Special Appeals of Maryland in which he raised the issues of his right to have the probation revocation hearing heard before the original sentencing judge,[3/] as well as the lower court's

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3. Neither Petitioner nor his former counsel raised this first issue at the revocation hearing and the record below gives no indication as to why a different judge heard the case. The Court of Special Appeals would not consider the question, ruling that (continued)

abuse of discretion in revoking probation because of Petitioner's failure to pay restitution (App. 41-42). The Court of Special Appeals issued its decision on April 9, 1986, affirming the judgment of the lower court on the ground that Petitioner had waived the first issue by failing to object below (App. 42), and that the lower court was not "clearly erroneous" in finding that Petitioner had willfully violated his probation by failing to pay the restitution (App. 48). Corcoran v.

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3. (continued) Petitioner had waived the issue by failing to object below (App. 2). In light of the specificity due process requires at revocation proceedings, see Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972), Petitioner submits that this issue should be considered by this Court so that the case can be remanded to determine, at the least, why the original judge was not available. It is the court's responsibility to ensure (continued)

State, 507 A.2d 200, 201; 203 (Md. 1986), cert. denied, _____ A.2d _____, 307 Md. 83. On May 9, 1986, the Court of Special Appeals issued its Mandate. On May 23, 1986, Petitioner timely filed a Petition for Writ of Certiorari to the Court of Appeals of Maryland. On July 24, 1986, the Court of Appeals denied the Petition (App. 49). Id.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GUARANTEES A CRIMINAL DEFENDANT THE RIGHT

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3. (continued) that procedural rules are followed, and it would impose an undue burden on a defendant to require him to object to proceeding before a different judge, particularly where, as here, the lower court failed to initiate any on-the-record inquiry as to the reasons why the original judge was not available. See People v. Clemons, 282 N.W.2d 838, 842 (Mich. App. 1979)(Beasley, J., concurring)("I would not require a Defendant about to be sentenced by a substitute judge to seek to disqualify him. Such a procedure places too great and too unfair a burden upon a Defendant. I would not hold that failure to object constituted waiver.")

TO HAVE HIS PROBATION REVOCATION HEARING HEARD BEFORE THE ORIGINAL SENTENCING JUDGE, OR, AT THE LEAST, THE RIGHT TO AN ON-THE-RECORD INQUIRY AS TO WHY THE ORIGINAL JUDGE IS NOT AVAILABLE.

This Court has held that a probationer is entitled to constitutional due process safeguards at revocation hearings. See Gagnon v. Scarpelli, 411 U.S. 776 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). Petitioner submits that, in the instant case, the process that is due includes the right to have his probation revocation hearing heard by the Judge who sentenced him unless it is demonstrated that this Judge is unavailable.

Numerous factors support the position that probation revocation proceedings should be held before the original sentencing Judge. As noted by the court in Smith v. State, 598 P.2d 1389 (Wyo. 1979):

"Probation is a matter over which the sentencing Judge takes a personal hand. His decision is one that he has made upon the basis of his own judgment of the defendant's potential. He has retained control over the defendant's conduct because of an intimate acquaintance with defendant as a person gained through his own observation in the courtroom and a special study of his background. No one is in a better position than the sentencing Judge to accomplish the objects of probation and keep track of it's progress. The supervision of probation, through his probation officers, is one of the most important duties performed by the trial Judge. It is one of his functions in which he cannot be completely impersonal. So there are compelling reasons for the particular Judge allowing probation to trace and retain an individual concern over each defendant in whom he has placed his confidence." 598 P.2d at 1391.

None of these factors are satisfied when a probation revocation hearing is held before a Judge completely unfamiliar with the Defendant and the circumstances under which he was originally sentenced. The decision to revoke probation and incarcerate a defendant should not simply be a reflexive reaction to some technical violation, but instead, should involve the considered judgment of the presiding judge after weighing all of the factors of the case and the character of the Defendant. Cf. Banks v. United States, 614 F.2d 95, 99 (6th Cir. 1980)("A cold hearing record is no substitute for personal observation."). "[I]t is, [therefore,] manifest that the court granting probation retains continuing jurisdiction over the probationer

throughout the entire period of his probation." Missouri v. Murphy, 592 S.W.2d 194, 196 (Miss. 1979). See also Coleman v. State, 633 P.2d 624 (Mont. 1981) (post conviction proceeding should be before the original sentencing Judge unless specific evidence is sought at the hearing from testimony by the sentencing court).

The instant case is a clear example of the reason why violation proceedings should be held before the original sentencing Judge. The record reveals little, if any, inquiry by the Judge who presided at the hearing as to the nature of the underlying offense and the reason why the sentencing Judge, who was the trier of fact, elected to strike out the conviction and grant the Defendant probation before judgment

pursuant to Article 27, Section 641, Md. Ann. Code. Nor does the record before the lower court disclose anything concerning the underlying home improvement violation.

Further, there is little indication that the court inquired as to the character of Petitioner in order to ascertain whether the probation before judgment should have been stricken and any further sentence be given. Instead, the lower court merely noted Petitioner's failure to pay the required restitution and imposed the maximum sentence under the applicable statute. Nothing in the record indicates that the court made any attempt to establish "an intimate acquaintance with the Defendant as a person," Smith v. State, supra, nor an attempt to determine why the original

trier of facts sought fit to impose probation before judgement in the first instance.

In considering the Defendant's right to have his probation revocation hearing heard before the original sentencing Judge, attention is drawn to Maryland Rule 4-346, which imposes the requirement that, "whenever practicable" the revocation hearing shall be held before the sentencing court:

> On motion of the State's Attorney, or by its own order, the Court may hold a hearing to determine whether any condition of probation has been violated. The motion or order shall state each violation of conditions charged and shall be served on the defendant in sufficient time before the hearing to permit a reasonable opportunity to rebut the charges. The hearing shall be held before the sentencing Judge, whenever practicable.

(Emphasis supplied)

Nothing in the record suggests any attempt by the court to ascertain the availability of the original sentencing Judge to preside at Petitioner's probation revocation hearing. This violation of the rules is not a mere technical defect. Instead, Petitioner submits that the rule embodies the rights guaranteed under the Fourteenth Amendment and confers a substantial procedural protection, the violation of which should cause reversal of Petitioner's conviction for violation of probation and the remand of this case so that the probation hearing and potential disposition may be heard before the original trier of fact.

The issue raised herein is one of first impression in this Court. There are no reported opinions by this

Court which address the question as to whether the Due Process Clause of the Fourteenth Amendment requires that a probation revocation hearing be heard before the original sentencing Judge. At the least, under the Fourteenth Amendment and the requirement of procedural specificity at revocation hearings as outlined by this Court in Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Morrissey v. Brown, 408 U.S. 471 (1972), the violation of Rule 4-346 requires remand of this case for an on-the-record inquiry as to whether the original sentencing Judge is available to preside at the revocation hearing.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WAS VIOLATED WHEN PETITIONER'S PROBATION WAS REVOKED FOR FAILURE TO PAY RESTITUTION

AFTER PETITIONER HAD DEMONSTRATED HIS INABILITY TO PAY.

Due process mandates that a defendant not be punished when he is unable to pay restitution or any pecuniary penalty as a result of factors beyond his control. Bearden v. Georgia, 461 U.S. 660 (1983). The lower court's disregard of Petitioner's testimony as to his inability to pay the required restitution violated Petitioner's rights guaranteed under the Fourteenth Amendment and requires reversal of his conviction for violation of probation.

A review of the transcript of the lower court proceeding indicates that Petitioner was unable to pay this restitution as a result of severe financial circumstances. Petitioner testified as to his efforts to pay the

restitution and the obstacles which prevented him from procuring the necessary funds (App. 14-15; 20-21). Further, the record below indicates that Petitioner attempted to submit a check through his former attorney's office; however, this check through some confusion was never forwarded to the victim (App. 10-11). These facts indicate Petitioner's good faith efforts to satisfy this condition of his probation. The lower court, however, completely ignored Petitioner's testimony and, without making any reasonable inquiry into Petitioner's financial circumstances, struck the probation before judgment and imposed the maximum sentence.

Careful inquiry must be made to ascertain whether a defendant's failure

to pay restitution was occasioned through no fault of his own. See Bearden v. Georgia, supra; United States v. Bozwell, 605 F.2d 171 (5th Circuit 1979); Smith v. State, 506 A.2d 1165 (Md. 1986). If the Defendant is not responsible for his non-compliance with the restitution requirement, probation should not be revoked. Id. This Court has written:

> "[I]f the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available. This lack of fault provides a "substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation

> inappropriate." Bearden v. Georgia, 461 U.S. 660, 668-669 (1983) (citations omitted).

Probation revocation proceedings involve a two step analysis; first, whether a condition of probation was violated; second, whether the probation should be revoked which includes inquiry as to whether the violation was beyond the Defendant's control. See Morrissey v. Brewer, 408 U.S. 471, 4799 (1972). The issue is not whether a condition of probation was violated; Petitioner admitted below (App. 7), pursuant to the agreed statement of facts, that he had, in fact, violated his probation. Instead, the issue is whether Petitioner demonstrated his inability to comply with this condition of probation which would mandate that his probation not be

revoked. Petitioner submits that the lower court's total failure to recognize this inability to pay the restitution constitutes a clear abuse of discretion and mandates reversal of the sentence imposed.

CONCLUSION

The Court is asked to consider for the first time whether the Due Process Clause of the Fourteenth Amendment requires that a defendant's probation revocation hearing be heard before the original sentencing Judge or, at the least, that some on-the-record inquiry be made as to why the original Judge cannot hear the case. The Court is also asked to consider whether Petitioner's Fourteenth Amendment rights were violated when the lower court violated Petitioner's probation after he

had demonstrated his inability to pay restitution. For all of these reasons, Petitioner prays that this Court issue its Writ of Certiorari to review the decision of the Court of Special Appeals of Maryland.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Rule 28, that on this 22nd day of September, 1986, three copies of the

foregoing were mailed, postage prepaid, to Ann Singleton, Assistant Attorney General, Office of the Attorney General, Criminal Litigation Section, 7 North Calvert Street, Munsey Building, Calvert and Fayette Streets, Baltimore, Maryland 21202, and that all parties required to be served have been served.

M. Albert Figinski
(Counsel of record)

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APPENDIX

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(P R O C E E D I N G S)

THE COURT: Good morning.

MS. HINES: Good morning, Your Honor. Your Honor, I have the continued violation from yesterday. I don't know if you want to proceed with that now or --

THE COURT: Yes, because you're due in Judge Allen's court. We will proceed with your case first so that you can go to Judge Allen.

MS. HINES: 48408323 through 24, the case of King Corcoran continued from yesterday. For the record, Deborah K. Hines, Assistant State's Attorney.

MR. LEWIS: Good morning, Your Honor, Neil Lewis representing Mr. Corcoran.

THE COURT: Good morning. How does your client plead to the charge of violation of probation, Mr. Lewis?

MR. LEWIS: Your Honor, we will enter a plea of not guilty. Technically we will submit to the Court that, in fact, the monies as required by the Court Order have not been paid and he is, in fact, in contempt or not in contempt but he is in default of the Court Order. We would submit all of that, Your Honor.

THE COURT: Well, are you going to agree, then, to a statement of facts by the State in this matter?

MR LEWIS: We would, Your Honor.

THE COURT: All right. Now, Mr. Corcoran, I want to explain to you, sir, that when your attorney, Mr. Lewis, says that you are going to agree to the statement of facts, what that means is that you will be agreeing with the State that what the State will say in its statement of facts is true. Now, this means that you will be giving up your

right to put on any witnesses on your behalf to contest what the State is saying. It means that you will not be able to testify yourself as to the facts of this case, that you in no way can contradict or alter or modify the facts as will be presented by the State.

Do you understand this, Mr. Corcoran?

MR LEWIS: You understand that the only thing will be read into the record this morning is a statement from the State's Attorney as to what happened previously in this particular proceeding and the indication that you have not made any payment on the restitution as ordered. Do you understand that?

THE DEFENDANT: Right, right.

THE COURT: And do you wish to proceed on this basis, then, Mr. Corcoran?

MR. LEWIS: We do, is that correct?

THE DEFENDANT: Yes.

THE COURT: All right. Fine. You may have a seat, then, and you may give me a statement of facts in this matter, then, Ms. Hines.

MS. HINES: Very well, Your Honor. Your Honor, if this case had proceeded to trial, the State's first witness would have been Sheila Brooks who is from the Division of Parole and Probation, a senior agent.

THE COURT: I don't want to know what the witness would have testified to. I want to know what the facts are. There's a difference between the two.

MS. HINES: The facts in this case are that the Defendant, Mr. King Corcoran, was placed on probation on October 31 of 1984 after a period -- before Judge Carl Bacharach in Circuit

Court for a home improvement violation. He was placed on probation in the number ending in 23 for failing to obtain a contract before entering into a home improvement repair work, and under that case he received a probation before judgment with the condition that -- special condition that he was supposed to pay $2,000 to Mr. William and Mrs. Delores Chrisman within sixty days, and he was also to pay court costs to the sheriff by November 7 of 1984.

THE COURT: How much were the court costs, do you know?

MS. HINES: The court costs were $120.

THE COURT: So it's $2,000 in restitution and $120 --

MS. HINES: To be paid to the sheriff's office.

THE COURT: All of that was due to be paid by --

MS. HINES: Separate dates. The restitution was to be paid within --

THE COURT: Sixty days.

MS. HINES: --sixty days from the date of october 31.

THE COURT: And the court costs?

MS. HINES: And the court costs were to be paid by November the 7th, 1984.

As to the other case, the case number that is ending in 24, wherein Mr. Corcoran was charged with abandonment of a home improvement contract, again, the judgment was stayed under Article 27, Section 641, and he received one year supervised probation concurrent with that in the first case.

He appeared before the probation agent, Ms. Brooks. He was advised of the rules and regulations of his probation, and specifically the special condition of paying $2,000 to the victim.

Your Honor, at some point in time, to be exact, on January 2, of 1985, Mr. Corcoran wrote a letter to Judge Bacharach requesting an extension of the payment date to pay the restitution in this case. Judge Bacharach in turn wrote a letter back to him, two letters, which I will offer to the Court, January 22 and January 30, extending the payment in this case to March the 1st of this year, 1985.

MR. LEWIS: We would agree to that.

MR. HINES: Your Honor, I would offer the letters into evidence as State's Exhibit No. 1 and No. 2, the letters dated January 22 and January 30 of this year.

THE COURT: So admitted.

(Two letters dated January 22, 1985 and January 30, 1985 were

marked as State's Exhibit Nos. 1 and 2, respectively, and received in evidence.)

MS. HINES: The restitution in the case was to be paid directly to the victim in this case, Mrs. Delores Chrisman. Mrs. Chrisman has not received the restitution in any amount from the Defendant, Mr. Corcoran. Additionally, the agent, however, who was supervising Mr. Corcoran, did receive a photocopy of an alleged check that was allegedly to have been paid to Bill and Delores Chrisman on April the 15th of 1984, and when, in fact, that check was not mailed. The State would offer this into evidence as State's Exhibit No. 3.

THE COURT: May I see that, please, after you mark it, Madam Clerk? Do I understand what you just said, Ms.

Hines, is that in April, about April the 15th, the Defendant sent to the Chrismans -- or rather sent to the probation agent a photostatic copy of a check in the amount of $2,000 dated April 15, 1985, purportedly showing a payment for the Chrismans --

MS. HINES: That's correct.

THE COURT: --in that amount, but that no such check ever was sent to them? Is that what you just said to me?

MS. HINES: That is correct, never went to the Chrismans. That is correct. Therefore, Your Honor, the State -- the agent wrote the report for violating the condition, condition No. 10, by failing to make restitution to the victim by the extension date which was March the 1st of 1985, and, Your Honor, that would be the facts in this case.

THE COURT: All right. Thank you, Ms. Hines. Mr. Lewis, do you agree that these are the facts in this case?

MR. LEWIS: It is, except, Your Honor, I think there's one thing that the State is not aware of, and that is the check, the purported check that was sent was actually sent. Unfortunately, it was sent to my office and returned to Mr. --

THE COURT: But it was never sent to the Chrismans?

MR LEWIS: It was not sent to the Chrismans or the probation department, was sent to my office.

THE COURT: All that the State was saying was that the check was never sent to the Chrismans.

MR. LEWIS: That is correct, Your Honor, but the State is not aware of what happened.

THE COURT: Mr. Corcoran, is this a complete and accurate statement of facts in this case?

THE DEFENDANT: Yes, sir, except I didn't know the Chrismans' address. I sent the check to Neil's office.

THE COURT: But it is correct that it never went to the Chrismans?

THE DEFENDANT: I'm sorry, sir?

THE COURT: It is correct that that check of April 15 never did go to the Chrismans?

THE DEFENDANT: No, it never got there, but he explained --

THE COURT: Okay. It never got there, okay. Thank you. That is the State's case at this time, then, Mr. Lewis.

MR. LEWIS: That's correct, Your Honor. Your Honor, if I may, more in mitigation than on the question of guilt or innocence in this particular matter --

THE COURT: Well, let me ask you this. Are you prepared for me to make a finding of guilt or innocence at this time, just on the finding, and then go into disposition after that?

MR. LEWIS: Well, before Your Honor makes a finding --

THE COURT: All right. Fine. I'll do it any way you want.

MR. LEWIS: Before you make a finding, my client has no record at this particular point. Your Honor at this time could find him guilty and strike out the probation without verdict and, of course, impose a sentence on him and impose all the penalties of law. My client has the money with him today, Your Honor, in the form of a personal check unfortunately, not a certified check, but a personal check, and I've explained to the victim that there is a

personal check available to her. The sequence of events that leads up to--

THE COURT: Why can't it be a certified check?

MR. LEWIS: Because, unfortunately, Your Honor, as you're aware, Mr. Corcoran did not notify me that there was a case going on until two o'clock yesterday afternoon or two-thirty yesterday afternoon, by which time the bank already closed, and I instructed Mr. Corcoran that he was to be in court this morning with money or money in some form to pay off some restitution.

THE COURT: But the banks were open at nine o'clock this morning.

MR. LEWIS: But he was in my office at eight-thirty this morning because I was completely unaware of the sequence of events since December which is the last time I saw him, and he was

in my office at eight-thirty this morning to get this thing resolved.

The sequence of events that he relates to me are that he did forward to my office in March a check and I immediately instructed him that that was to be sent to the probation department so that they would be aware of the fact that the victims had been paid. Unfortunately, Mr. Corcoran, in the interim of time, between the time I sent him the check and it went back to his house, apparently separated from his wife and was summarily rejected from his home.

THE COURT: Where does he live?

MR. LEWIS: He lives in Potomac, Maryland, 10 Accord Court, Potomac, and the sequence of events deteriorated from that, and he's now separated from his wife, and they're in dispute over all his assets. He had assets in one of the

savings and loans that's been frozen by the State, and it's a sad sequence of events.

THE COURT: They weren't frozen back last fall or last winter or spring.

MR. LEWIS: But he did get an extension so theoretically until March he's somewhat legitimate. It's after March that I think the problem becomes less than legitimate, Your Honor, but, you know, as I said, the sequence of events that he's relating are a sad sequence of events on the deterioration of his personal life, and I think the important point in the whole situation is that he is ready to pay the victim this morning, to make restitution, and it's my understanding that he already paid the court costs, so it's just the $2,000 that he --

THE COURT: Paid it by check or cash?

MR. LEWIS: He paid it in cash, I believe, within several days.

THE DEFENDANT: Four months ago by check.

MR. LEWIS: Four months ago he paid the court costs by check.

THE COURT: That's not according to the statement of facts given by the State. Her statement of facts is nothing has been paid on the court costs yet.

MR. LEWIS: It's my understanding it has and we can very easily check that out, so there's no problem with that. I'm asking Your Honor essentially to stay any finding at this particular time in this particular case, give him the opportunity to pay over to the victim the $2,000 which he has, on, of course, the condition that that check is good and goes through the bank, and that the victim is, in fact, reimbursed, and if,

in fact, it does go through the bank, I would ask Your Honor to simply dismiss these proceedings and chalk it up to bad experience on Mr. Corcoran's part, and leave his record in the status quo which it is right now.

Your Honor, it's unfortunate that he let it get this far and it's unfortunate that he pushed the system to the limit, but it is a situation where I think that everybody intended for the victim to be reimbursed and that's the prime purpose of this entire proceeding, and fortunately and hopefully this morning that will be accomplished.

THE COURT: What bank is this check drawn on, Mr. Lewis?

THE DEFENDANT: It's my wife's check. It's my money but she's got my money.

MR. LEWIS: She grabbed all of the joint assets when --

THE COURT Who signed this check?

MR. LEWIS: The wife.

THE DEFENDANT: She's got my money in the checking account.

THE COURT: Well, what bank?

THE DEFENDANT: It's drawn on American Security Bank.

THE COURT: What bank?

THE DEFENDANT: American Security Bank in Washington.

MR. LEWIS: The victim, by the way, is from the suburbs of Washington, so it would be relatively easy for he to get the check cleared fairly quickly.

THE COURT: If there's money in there.

MR. LEWIS: It's in there, as I understand it, Your Honor.

THE DEFENDANT: Your Honor, I'm not crazy enough to try to give a $2,000 bad check. I mean, I'm not that crazy. I'm not crazy.

THE COURT: All right. Thank you, Mr. Lewis. Mr. Corcoran, I'm going to find you guilty of the charge of violating your probation. The statement of facts clearly indicate you were guilty. You don't contest the facts and I feel that the only appropriate finding under all the circumstances and the history of this case is the finding of guilty.

We come now to the matter of disposition. Mr. Lewis, perhaps your arguments were already directed to that phase. If you wish to be heard further on that --

MR. LEWIS: No, I think that I've given Your Honor an explanation.

THE COURT: All right. Now, Mr. Corcoran, before I do make any disposition in your case, you have the right, if you wish, to say anything further to me that you would like to say

in addition to what Mr. Lewis has said. You don't have to say anything at this time if you don't want to, but if you do want to say anything to me, I'll be happy to hear from you.

THE DEFENDANT: Okay. All I was saying, Your Honor, is that I got in this jam because I got separated from my wife. I got two children in college and got jammed up, and when somebody grabs your money, and she's got it in the checking account, and you got obligations, it put me in a little bit of a bind, and so I've been scrambling --

THE COURT: But this problem with your wife occurred in the spring.

THE DEFENDANT: No, it happened in the middle of February, Your Honor.

THE COURT: All right. Well, February.

THE DEFENDANT: That's why I asked for the extension.

THE COURT: But the money was due --

THE DEFENDANT: March 1.

THE COURT: No, the original money was due on December 31.

THE DEFENDANT: Yes, I saw the winds blowing, though, Your Honor.

THE COURT: You saw the winds blowing?

THE DEFENDANT: I saw where it was coming with her and that's why --

THE COURT: Well, you saw the winds blowing but the wind hadn't blown far enough to tie up all your assets at that time, correct?

THE DEFENDANT: I'm wrong, Your Honor. You're right.

THE COURT: So you had those assets available to yourself on December 31 but you decided you wanted to have an extension, and what kind of work do you do? Is home improvement your --

THE DEFENDANT: No, I do development here in Baltimore. I have --

THE COURT: I'm sorry. I can't --

THE DEFENDANT: I buy and sell houses in Baltimore. I fix up houses here in Baltimore, and what I do is buy them and subcontract the work out to people and we renovate them. I mean, I renovate houses in the City.

THE COURT: Under what name?

THE DEFENDANT: S & K Associates.

THE COURT: S. Associates?

THE DEFENDANT: No, S & K Associates. Yes, my law firm handling my closings and settlements is Bass and --

THE COURT: I'm sorry.

THE DEFENDANT: My law firm does all the settlements here is Bass & Denick. They handle all my legal work here in town. Bass & Denick, they handle -- Bass and --

THE COURT: With whom are you associated in your work here in Baltimore?

THE DEFENDANT: When you say --

MR. LEWIS: Who are you associated with?

THE DEFENDANT: You mean, the attorney?

THE COURT: No, no, your business partner. Evidently you have a business partner or are you on your own?

THE DEFENDANT: No, I'm on my own. My sign, S&K, my name is Sean King Corcoran, so I call it S&K.

THE COURT: And how long have you been in this business?

THE DEFENDANT: Five years.

THE COURT: How old are you, sir?

THE DEFENDANT: Forty -- forty-one years old.

THE COURT: And what did you do before you were in this business?

THE DEFENDANT: I was a professional football player for twelve years.

THE COURT: For what team?

THE DEFENDANT: New York and Philadelphia.

THE COURT: New York Giants and --

THE DEFENDANT: No, Jets, and the Philadelphia --Philadelphia of the World Football League.

THE COURT: And the World Football League?

THE DEFENDANT: I was the quarterback in Philadelphia.

THE COURT: They were called the --

THE DEFENDANT: We went out of business and I lost $170,000 in that deal.

THE COURT: How many years did you play for the New York Jets?

THE DEFENDANT: Three years, Your Honor. We beat the Colts in 1968, the Superbowl.

THE COURT: Were you on the team that year?

THE DEFENDANT: Yeah, I was one of the backup quarterbacks. It was me, Bob Corelli, and Joe Nameth were the quarterbacks.

THE COURT: Three years for the Jets and nine years with Philadelphia?

THE DEFENDANT: Yes, back and forth, Philadelphia, twelve years playing professional football.

THE COURT: And you played college football, I assume?

THE DEFENDANT: Yes, the University of Maryland.

THE COURT: Who coached you in the University of Maryland?

THE DEFENDANT: Tom Nugent.

THE COURT: So from college you went into pro football for twelve years and then you went into business?

THE DEFENDANT: Right, right.

THE COURT: And how many children do you have?

THE DEFENDANT: I have two, Your Honor, a 20-year-old son and and 18-year-old daughter, and both of them are in college.

THE COURT: Both go to college?

THE DEFENDANT: Yes.

THE COURT: And you say an 8-year-old --

MR. LEWIS: No, 18.

THE DEFENDANT: Eighteen.

THE COURT: And where do they go--

THE DEFENDANT: One goes to the University of Arizona and one goes to the University of Tampa.

THE COURT: And how long have you lived in Potomac?

THE DEFENDANT: Almost fifteen years, fifteen years. It's outside of Washington.

THE COURT: Yes, I know where Potomac is. Is there anything else you wish to tell me at this time, Mr. Corcoran?

THE DEFENDANT: No, but I goofed up. I know I goofed up, and I just got to throw myself on the mercies of the Court. I screwed up.

MR. LEWIS: Your Honor, just one other comment. The victim is in the courtroom who's sitting in the rear.

THE COURT: Which lady is Mrs. Chrisman?

MR. LEWIS: The lady in the white, Your Honor, and I think that at this point she would be most appreciative just to get restitution in this case and to get it over with. She lives in Virginia but unfortunately has had to

come up here three or four times as a result of this, but I think she would like to have it resolved and over with finally and fully at this point, Your Honor.

THE COURT: Mrs. Chrisman, I noticed that you just delivered a message to the State's Attorney. If there's anything you wish to say in this matter, I'll be happy to hear from you.

MRS. CHRISMAN: May I say it from here?

THE COURT: Was that note a message that you wanted to convey to me?

MRS. CHRISMAN: Yes, possibly, yes.

THE COURT: All right. Why don't you come up here and tell me what you want to say to the State.

MRS. CHRISMAN: The only question that I have, I believe I understood him to say that his home address was 10

Accord Court on the one hand, and on the second hand, he said that he was evicted. Well, that was the home address where he an his wife were living, and if he has been evicted, why is that still his home address?

MR. LEWIS: Well, that's still the address on the checking account.

THE DEFENDANT: Your Honor, I'm in the process -- I'm kind of halfway back with my wife --

THE COURT: You're talking so fast I can't hear you.

THE DEFENDANT: I'm nervous. For the last week I've been living with my wife in different parts of the house.

THE COURT: Well, last week, where were you living before last week?

THE DEFENDANT: I was in Ocean City staying with friends for the last couple of months because I wasn't back in my house. It's a big house, and I

own it, and so she's back there and I'm here --

THE COURT: What do you mean it's a big house?

THE DEFENDANT: It's a big house, big house.

THE COURT: What does it cost you to build?

THE DEFENDANT: It's probably worth, I guess, 300,000, maybe 350,000.

THE COURT: It's worth 300,000 or 350,000 today you say?

THE DEFENDANT: Yes.

THE COURT: That's probably one of the lower Priced houses in Potomac.

THE DEFENDANT: Sugar Ray Leonard lives around the corner from me. The Firestones live -- well --

THE COURT: Mr. Corcoran, it pains me to have to feel this way and to say this and to be as blunt as I feel I must be, but beneath all of what I

perceive to be a veneer of charm and glibness, I think you're a fraud and a cheat. I think this whole case reeks of that from day one in this case with these people, Mrs. Chrisman and her husband.

I'd like to ask you, Mrs. Chrisman, if you would step up here a moment, please, where are you from in Virginia, please?

MRS. CHRISMAN: Reston, Virginia.

THE COURT: And you and your husband live there in the house?

MRS. CHRISMAN: Yes.

THE COURT: And what type of work was supposed to be done?

MRS. CHRISMAN: Not on our house in Reston. It was in a rental, two other properties in the Baltimore area that we own.

THE COURT: That you own?

MRS. CHRISMAN: Yes.

THE COURT: And how did you get in contact with Mr. Corcoran on this?

MRS. CHRISMAN: Well, he was the real estate salesman working for companies from whom we bought the properties and that's how we met him, and he offered to help us get the properties back in rental condition.

THE COURT: And where are these properties in Baltimore?

MRS. CHRISMAN: One of them is located at 739 East Preston and one is at 919 North Broadway.

THE COURT: All right. Thank you very much.

And by being a fraud and a cheat, you're a thief, and because you defraud people and you cheat people, you steal from people, and to me, it's just that simple, and to me you not only have defrauded these people and taken advantage of these people, but you have

defrauded this Court, played fast and loose with this Court. The Judge gave you a break originally in making a finding of probation before judgment because you had no prior record, and he gave you a break there. He gave you two months to make the payment. Everything was fine. Even though you knew the winds were blowing, you agreed to this, but not a penny, not only payment in full, but not a penny was paid on the restitution or the court costs by the due dates, November the 7th for the court costs. November 7 was the date?

MS. HINES: Yes, it was, Your Honor.

THE COURT: Which was just a week later. Those court costs were to be paid one week later. You agreed and the winds could not have changed that much in one week. Not in one week the winds

didn't change that much, and you weren't talking, in your milieu, $125.

MS. HINES: 120.

THE DEFENDANT: Your Honor, I --

THE COURT: I'm talking right now sir. $120 for you to come up within a week's time in your situation and your economic posture wasn't asking for the world, and you agreed to it. You agreed to it. It wasn't paid a week later, not a penny of it. It wasn't paid many, many weeks and months later, and according to the records, still isn't paid, but even if you're right that it has been recently, well, these people have been cheated out of their money, Mr. and Mrs. Chrisman.

You got an extension from Judge Bacharach. He gave you a second chance, a second chance. You failed that, and being the sports figure you are, even you know what three strikes mean. Mr.

Lewis argued that the primary reason we are here is to see that the Chrismans get paid. That is not my primary purpose in this case. Obviously, it's the primary interest of Mr. and Mrs. Chrisman. Yes, obviously, it's their primary reason, and if I were in their shoes, that would be my primary interest, but I'm not in their shoes. I don't sit here as a collection agency. This Court is not a collection agency. This is a court of law, sitting right now as a criminal court of law.

This is a crime that's a crime against the State of Maryland which is why its being prosecuted by the State of Maryland. It's a crime against the citizens of our community, because the community at large is hurt and is diminished when people go out defrauding other people, and it's part and parcel of white collar crime, part and parcel

of white collar crime, not the world's biggest example of white collar crime syndrome that is insidious, and where it's a white collar criminal, when he's caught, comes in and says, well, here's the money, as if that takes care of everything. The poor street criminal who comes in here who steals a few dollars, he only wishes he could come in and say, well, okay, here is the money; I'll pay it back to these people, but the poor street criminal that comes into the court doesn't have any money to make restitution with. I don't excuse or condone at all the street criminal, but I can find more mitigation for him than I can for you. I find none for you.

I can find some for a street criminal who's desperate, who has nothing, who is up against it, has no opportunities. I can see the desperation in their eyes, although I

don't condone what they do, and they can't come into court and say, I'll make good on it, but white collar criminals always do, and they think that takes care of it, that money takes care of everything. You're very glib. You're very handsome. You have all kinds of personalities, all kinds of nice winning smiles, but you're a cheat and a fraud.

Accordingly, with respect to warrant No. 48408323 and warrant No. 48408324, as to each case, I'm going to sentence you for a term of six months' imprisonment to be under the jurisdiction of the Division of Correction, the sentences to run concurrently, to run from today's date. I'm going to suspend all but three months of the sentence on condition that you make restitution in full of Mr. and Mrs. Chrisman by way of certified check or cash on or before one week from

today, August 16, 1985, and on further condition that you pay the court costs in full, if they have not already been paid, by certified check or cash by the same date.

Another example of this fraud is sending to the State's Attorney this photostatic copy of this check. What a fraud that was. If the Chrismans do not have in their hands by one week from today, August 16, a certified check in the amount of $2000 or $2000 in cash, and the court costs also being paid in full in the same manner, then you will serve six months. As it is, you will serve three months if you meet that condition, so it's up to you whether you serve three months or six months. That is up to you.

Mr. Lewis, do you wish to advise your client of his rights at this time, sir?

MR. LEWIS: You have a right to file, within three days, a Motion For Reconsideration of Sentence. You have a right to file, within thirty days, an appeal to the Court of Appeals of the State of Maryland, and within ninety days, for a Reconsideration of Sentence. All of that has to be done in writing. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And I am going to set an appeal bond in the amount of $20,000. Thank you, counsel. That will conclude the hearing.

Sheriff, take him in custody like you take anybody else in custody, sir.

(The proceedings concluded.)

King CORCORAN

v.

STATE of Maryland.

No. 991, Sept. Term, 1985.

Court of Special Appeals of Maryland.

April 9, 1986.

Gregg L. Bernstein (M. Albert Figinski, on brief), Baltimore, for appellant.

Ann E. Singleton, Asst. Atty. Gen. (Stephen H. Sachs, Atty., for Baltimore City and Deborah K. Hines, Asst. State's Atty., for Baltimore City, on brief), Baltimore, for appellee.

Argued before MOYLAN, ROSALYN B. BELL and ROBERT M. BELL, JJ.

MOYLAN, Judge.

The appellant, King Corcoran, was originally found guilty in the Circuit Court for Baltimore City of two criminal violations involving the home

improvement law. Judge Carl W. Bacharach struck the finding of guilt under the provisions of Art. 27, § 641 and placed the appellant on supervised probation for a period of one year. The appellant was ordered to pay restitution in the amount of $2,000 within 60 days and also to pay court costs. On August 9, 1985, the appellant was found guilty of having violated the terms of his probation by Judge Robert I.H. Hammerman. Judge Hammerman struck the probation before judgment and ordered the appellant to serve a term of three months imprisonment. Upon this appeal, the appellant raises two contentions:

1) That Md. Rule 4-346 was violated when the probation revocation hearing was held before a judge different from the

one who had imposed the original sentence; and

2) That Judge Hammerman abused his discretion in revoking the probation because the appellant's failure to pay restitution was not willful.

The short answer to the appellant's first contention is that it is an afterthought. When the revocation hearing was convened by Judge Hammerman and through the entire course of that hearing, the appellant made no remote objection to the fact that it was Judge Hammerman and not Judge Bacharach upon the bench. Nothing has been preserved for appellate review.

Few principles are more basic to appellate review then that the reviewing court "will not ordinarily decide ny point or question which does not plainly

appear by the record to have been tried and decided by the lower court." Md. Rule 1085. In Medley v. State, 52 Md. App. 225, 230-231, 448 A.2d 363 (1982), Judge Wilner thoroughly discussed the long history and enduring value of this procedural requirement of contemporary objection. He concluded, at 52 Md. App. 231, 448 A.2d 363:

> "It is a matter of basic fairness to the trial court and to opposing coursel, as well as being fundamental to the proper administration of justice; and one need only look at the extensive annotations to Maryland Rules 885 and 1085 to see that it is rigorously enforced. Even errors of Constitutional dimension may be waived by failure to interpose a timely objection at trial."

The appellant claims that he is exempted from the otherwise foreclosing effect of Maryland Rule 1085 by Walszak v. State, 302 Md. 422 488 A.2d 949 (1985). He reads Walszak far too broadly.

In holding that an illegal sentence may be reviewed on appeal even if not objected to below, the Court of Appeals was very careful to limit the exemption to a situation where the sentence was illegal in itself, a sentence "not permitted by law." 302 Md. at 427, 488 A.2d 949. The Walczak opinion was not dealing with alleged procedural flaws in the sentencing hearing itself. Both the literal holding of Walczak and the reasoning behind it were well spelled out by Judge Eldridge, at 302 Md. 427, 488 A.2d 949:

> "We hold that when the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court. Such review and correction of an illegal sentence is especially appropriate in light of the fact that Rule 4-345(a), formerly Rule 774 a, provides that '[t]he court may correct an illegal sentence at any time.' Thus, a defendant who fails to object to the imposition

> of an illegal sentence does not waive forever his right to challenge that sentence.... Moreover, because the defendant would be entitled to post conviction relief if a sentence is clearly illegal although not objected to at trial, interests of expedition and judicial economy support review of the sentence on direct appeal." (Citation omitted).

The appellant's contention in this regard is not only bereft of support in the case law, it is bereft of logic as well. The notion of an "illegal sentence" within the contemplation of the Walczak decision dealt with substantive law, not procedural law. It has obvious reference to a sentence which is beyond the statutorily granted power of the judge to impose. It does not remotely suggest that a sentence, proper on its face, becomes an "illegal sentence" because of some arguable procedural flaw in the sentencing procedure. For the appellant

to prevail on his line of reasoning would create an absurdity. A sentencing procedure (and, by analogy, a probation revocation hearing) is more informal in nature than a trial upon the merits. It is before a judge and not a jury. The more rigid rules of evidence are generally not applicable. It would create a ridiculous anamoly to hold that challenges to errors in the more tightly scrutinized trial itself may be forfeited through failure to object, whereas challenges to errors in the looser and more informal proceeding are always preserved even absent objection. Walczak did not remotely suggest such a bizarre and incongruous result.

The appellant's claim that Judge Hammerman abused his discretion in revoking the probation is also without merit. The appellant admitted that he had not complied with the restitution

order. He claimed that, through financial circumstances beyond his control, he was unable to make the payments. Judge Hammerman, within his fact-finding prerogative, did not believe him. Since the $2000 in restitution was to have been paid by December 31, 1984, the freezing of the appellant's assets later in the winter was immaterial to the violation. Judge Hammerman found, moreover, that the appellant's separation from his wife did not reach a critical stage until February, 1985, several months after the due date of the restitution. It was further developed that the appellant was still living with his wife in their house in Potomac, Maryland, the house being worth between $300,000 and $350,000. The appellant's probation officer reported that the appellant had never complained of financial

difficulties. The probation officer, moreover, received a photocopy of a check from the appellant indicating that full payment had been made to the victims, notwithstanding the fact that the restitution was never sent to the victims.

Under the circumstances, we cannot say that Judge Hammerman was clearly erroneous in his fact finding that the appellant was guilty of a willful violation. Based upon that fact finding, the disposition of the case did not represent an abuse of discretion.

JUDGEMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

KING CORCORAN

v.

STATE OF MARYLAND

IN THE

COURT OF APPEALS

OF MARYLAND

Petition Docket
No. 178

September Term, 1986

(No. 991, September
Term, 1985

Court of Special
Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Cheif Judge

Date: July 24, 1986

The Fourteenth Amendment, United States Constitution, provides, in pertinent part, that:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . . ."

28 United States Code §1257 provides, in pertinent part, that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Article 27, Section 641, MD. ANN. CODE provides, in pertinent part, that:

(a) Probation after plea or finding of guilt; power of court to provide terms and conditions; waiver of right to appeal from judgment of guilt. (1) (i) Whenever a person accused of a crime pleads guilty or nolo contendere or is found guilty of an offense, a court exercising criminal jurisdiction, if satisfied that the best interests of the person and the welfare of the people of the State would be served thereby, and with the written consent of the person after determination of guilt or acceptance of a nolo contendere plea, may stay the entering of judgment, defer further proceedings, and place the person on probation subject to reasonable terms and conditions as appropriate. The terms and conditions may include ordering the person to pay a

fine or pecuniary penalty to the State, or to make restitution, but before the court orders a fine, pecuniary penalty, or restitution the person is entitled to notice and a hearing to determine the amount of the fine, pecuniary penalty, or restitution, what payment will be required, and how payment will be made. The terms and conditions also may include any type of rehabilitation program or clinic, or similar program, or the parks program or voluntary hospital program.

ARTICLE 56, SECTION 255(a), MD. CODE

§255. License required; restrictions on salesman.

(a) License required. Except when otherwise specifically exempted by the provisions of this subtitle, no person shall act in the capacity of a contractor, subcontractor, or sales-man unless authorized to do so by a subsisting license for each such capacity issued in accordance with the provisions of this subtitle.

ARTICLE 56, SECTION 261(a)(1), MD. CODE

(CUM. SUPP. 1985)

§261. Prohibited acts; penalties.

(a) The following acts are prohibited: (1) Abandonment or failure to perform, without justification, any home-improvement contract or project engaged in or undertaken by a contractor; or deviation from or disregard of plans or specifications in any material respect without the consent of the owner;

ARTICLE 56, SECTION 268, MD. CODE

§268. General penalty.

Any person who knowingly and wilfully violates any provision of this subtitle, with respect to which a greater penalty is no otherwise provided by the provisions of this subtitle or by any other law, in addition to any administrative penalty otherwise applicable thereto, is guilty of a misdemeanor, and upon conviction thereof by a court of competent jurisdiction of this State shall be punished by a fine not exceeding $1,000 or imprisonment not to exceed 6 months or both.

Rule 4-346, Maryland Rules of Procedure, provides, in pertinent part, that:

(c) Hearing on Violation of Conditions. On motion of the State's Attorney or by its own order, the court may hold a hearing to determine whether any condition of probation has been violated. The motion or order shall state each violation of conditions charged and shall be served on the defendant in sufficient time before the hearing to permit a reasonable opportunity to rebut the practicable. The provisions of Rule 4-242 do not apply to an admission of violation of conditions of probation.

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